

FILED
OCT 3 1940

CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

NEW YORK LIFE INSURANCE
COMPANY, a New York Corporation,
Petitioner,

vs.

BEULAH C. CALHOUN,

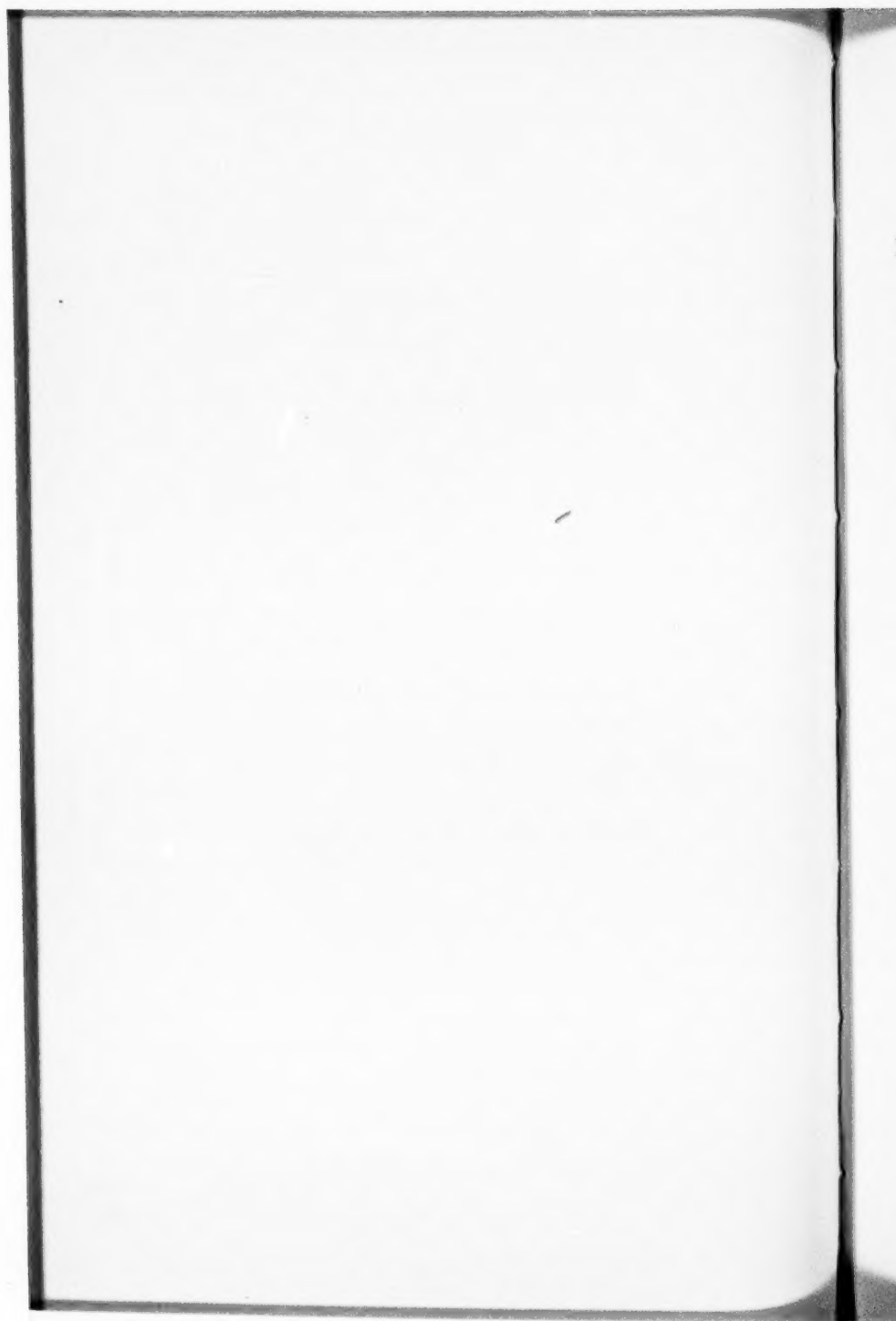
Respondent.

No. 482.. ✓

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT
and
BRIEF IN SUPPORT THEREOF.**

JAMES C. JONES,
JAMES C. JONES, JR.,
Counsel for Petitioner.

LOUIS H. COOKE,
VINCENT L. BOISAUBIN,
Of Counsel.



INDEX.

	Page
Petition for writ of certiorari.....	1-4
Summary statement of the matter involved.....	1
Reasons relied on for the allowance of the writ....	3
Prayer for writ.....	4
Brief in support of petition.....	5-13
The opinions of the court below.....	5
Jurisdiction	5
Statement of the case.....	6
Specification of errors.....	6
Argument	6
Sole question involved is whether or not under de- cisions of Supreme Court of Missouri plaintiff made a case of "vexatious delay" for submis- sion to the jury.....	6
Under Missouri decisions there is no "vexatious- ness" and no case made for submission to the jury if	
(a) There is a bona fide conflict of fact....	7, 8
or	
(b) There is a dispute of law.....	7, 10
Conclusion: Court of Appeals failed to follow con- trolling Missouri decisions	13

Cases Cited.

Aufrechtig v. Columbia National Life Ins. Co., 298 Mo. 1, l. c. 16.....	8
--	---

Burgess v. Pan-American Life Ins. Co., 230 S. W.	
315 (Mo.)	10
Erie R. R. v. Tompkins, 304 U. S. 64.....	5, 7, 13
Kern v. Supreme Council, 167 Mo. 471.....	10
Kirk v. Metropolitan Life Ins. Co., 336 Mo. 768.....	10
Lyon v. Mutual Ben. H. & A. Co., 305 U. S. 484.....	5, 13
Ruhlin v. New York Life Ins. Co., 304 U. S. 202....	5, 7, 13
State ex rel. Continental Life Ins. Co. v. Allen, 303 Mo.	
608, l. c. 620.....	8
State ex rel. Gott v. Fidelity & Deposit Co., 317 Mo.	
1078, l. c. 1095.....	8, 11
Wichita Royalty Co. v. City Natl. Bk., 306 U. S.	
103	5, 13

Statutes Cited.

Judicial Code, Sec. 240 (a), as amended by Act of Feb.	
13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347)....	5
R. S. Mo. 1929, Sec. 5929.....	7

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

NEW YORK LIFE INSURANCE
COMPANY, a New York Corporation,
Petitioner,

vs.

BEULAH C. CALHOUN,

Respondent.

No.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the New York Life Insurance Company,
a corporation, respectfully shows to this Honorable Court:

A.

**SUMMARY STATEMENT OF THE MATTER
INVOLVED.**

On January 9, 1936, petitioner filed suit in equity in the District Court of the Eastern Judicial District of Missouri to cancel an insurance policy issued by it to William J. Calhoun for \$10,000.00 on the ground of misrepresentations in the application. The defendant was Beulah C. Calhoun, beneficiary in the policy.

On July 1, 1937, the District Court entered its decree denying the petition to cancel and dismissing the bill (Equity R. 14).

Appeal was taken to the Court of Appeals for the Eighth Circuit, which court, on July 13, 1938, affirmed the decree of the lower court.

Meanwhile, and on February 7, 1936, the beneficiary, Beulah C. Calhoun, instituted an action at law in the state court at St. Louis, Missouri, to recover on the policy. In this action she also sought statutory penalties and damages for alleged vexatious refusal to pay the policy (Law R. 1-3).

This law action was removed to the federal court—the same court in which the equity suit was pending—on the grounds of diversity of citizenship (Law R. 6), and was there stayed pending the outcome of the equity suit (Law R. 11).

Shortly after the equity suit was decided by the Court of Appeals, and on October 6, 1938, the defendant in the law action (New York Life Insurance Company, petitioner herein) offered to pay the full amount of the policy, with interest (Law R. 181).

This offer was refused (Law R. 181). Thereupon, on October 19, 1938, the said defendant in the law action filed its answer admitting liability for the amount of the policy and repeating the said offer to pay the full amount of the policy and interest and denying any vexatiousness in the refusal or delay in paying the policy. (See Answer, Law R. 13-16.)

The law action was tried in the District Court on November 15-16, 1938 (Law R. 16), in which the sole issue was that of vexatious refusal to pay. The trial resulted in a verdict for the plaintiff for the amount of the policy and

interest (\$11,771.71) and also for \$3,975.00, being \$3,225.00 attorneys' fees and \$750.00 additional damages as penalties under the Missouri statute for vexatious refusal to pay the loss (Law R. 20).

The case was appealed to the Court of Appeals for the Eighth Circuit, in which the issue was whether or not under the conceded facts there was a case of "vexatious refusal" as a matter of law as that question had been determined by the Supreme Court of Missouri.

On August 2, 1940, the Court of Appeals affirmed the verdict and judgment of the lower court (Law R. 231), and on August 22, 1940, denied the appellant's petition for a rehearing (Law R. 274).

B.

**REASONS RELIED ON FOR THE ALLOWANCE
OF THE WRIT.**

1. The Circuit Court of Appeals has decided an important question of local law in conflict with applicable local decisions.

2. The ultimate facts in the case on the issue of vexatious refusal were undisputed. Those facts either made a case for submission to the jury of the issue of vexatious refusal or they established, as a matter of law, that there was no vexatious refusal.

The Circuit Court of Appeals held that the issue of vexatious refusal was one of fact for the jury.

Under the undisputed facts and under the controlling decisions of the Supreme Court of Missouri, there was no vexatious delay as a matter of law.

The Circuit Court of Appeals, therefore, erred in deciding that the case was one for the jury, and erred in failing

and refusing to decide that there was no vexatious refusal as a matter of law, because its decision was in conflict with applicable and controlling decisions of the Supreme Court of Missouri.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals, Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in case numbered 11,492 on its docket and entitled New York Life Insurance Company, a Corporation, Appellant, v. Beulah C. Calhoun, Appellee, and that the said judgment of the Circuit Court of Appeals, Eighth Circuit, may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

NEW YORK LIFE INSURANCE COMPANY,

By JAMES C. JONES,
JAMES C. JONES, JR.,
Counsel for Petitioner.

LOUIS H. COOKE,
VINCENT L. BOISAUBIN,
Of Counsel.